

(2001) 05 BOM CK 0026

In the Bombay High Court

Case No : Appeal From Order No's. 27 and 28 of 2001

Bandekar Brothers Pvt. Ltd.

APPELLANT

Vs

V.G. Quenim A propriety concern of Mr. Vassudev alias
Manohar Guiri Quenim and Smt. Vilasini Vassudev alias
Manohar Guiri Quenim

RESPONDENT

Date of Decision : 11-05-2001

Acts Referred:

Citation : (2001) 4 BomCR 390

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : S.D. Lotlikar and Rupali Thakur, for the Appellant; M.S. Usgaonkar and Sudin Usgaonkar, for the Respondent

Judgement

A.M. Khanwilkar, J.—Admit.

2. Both these appeals can be disposed of together, for the subject matter as well as the parties to the proceedings are common; and, in fact, the Trial Court by the impugned order has disposed of the two separate applications filed in the same suit by common order.

3. Briefly stated the Appellants instituted suit before the Court of Civil Judge, Senior Division, Bicholim being Special Civil Suit No. 7/2000/A for the following reliefs against the Respondents, which reads thus:

For a Decree, directing the Defendants to pay to the Plaintiffs, the amount of Rs. 91,89,973.50, being Rs. 67,97,385.50, towards the Principal amount; and Rs. 23,92,588.00, towards interest at the rate of 18% per annum from 1/4/98 till 31/1/2000; and further interest at the rate of 18% per annum from 1/2/2000, till the institution of the Suit, with further interest of 18% per annum from the date of filing of the Suit, on the amount adjudged, as being payable by the Defendants to the Plaintiffs, till final payment;

For attachment before judgment of the property belonging to the Defendants and

more particularly described in the SCHEDULE-I annexed hereto;

For a conditional attachment before judgment of the property of the Defendants described in the SCHEDULE-I, hereto annexed, pending the final judgment for attachment of the said property;

For costs.

4. In the said suit Appellants took out two separate applications being Civil Miscellaneous Application No-19/2000/A praying for direction against the Respondents to furnish a security in the sum of Rs. 91,89,973-50 within such time as Court directs and to produce and place at the disposal of the Court when required, the property more particularly described in Schedule-I or the value thereof to satisfy the decree and conditional attachment of the said property. The property has been described in Schedule-I which is at page 107 in Appeal From Order No. 28/2001. Whereas, by another application being Civil Miscellaneous Application No-50/2000/A, the Appellants prayed for restraining the Respondents/ Defendants from removing or shifting the iron ore located at Kudnem, Bicholim, Goa, in the property surveyed under survey No. 148/1 of Kudnem village and the iron ore lying at the Defendants Sonshi Mines and the Sonshi stockyard and from in any manner transferring or disposing of or parting with possession of or creating any third party rights in the mining machinery and the residential Bungalow mentioned in the schedule amended to the application.

5. The Court below after considering the rival submissions was in effect pleased to dismiss the Civil Miscellaneous Application No. 19/2000/A whereby prayer for attachment before judgment was made, whereas partly allowed the other application No. 50/2000/A which prayed for injunction during the pendency of the suit to the extent mentioned in the operative order which reads thus:

ORDER The applications are partly allowed.

Pending the suit, Defendants shall not dispose off and/or alienate/transfer or sell the assets mentioned at serial No. 3 of Schedule-I i.e. machinery lying at Sonshi mines and at Kudnem stockyard till the disposal of the suit.

It is also ordered that if the Defendants choose to give on hire the machineries mentioned above, they shall do so by placing on record copy/copies of hiring agreements on record within one week from its execution.

It is also ordered that in the event if any of the machineries mentioned above renders unfit for use or of scrap value or needs to be replaced by new machinery/ machineries, Defendants are at liberty to approach the Court for appropriate orders in the matter.

Rest of the reliefs stands rejected.

6. As aforesaid, the Appeal From Order No. 27/2001, seeks to challenge the order passed below Civil Miscellaneous Application No. 19/2000/A, whereas the Appeal From Order No. 28/2001 takes exception to the order passed below Civil

Miscellaneous Application No. 50/2000/A to the extent injunction is refused in regard to the remaining properly mentioned in the schedule.

7. Shri S.D. Lotlikar, learned Senior Advocate appearing for the Appellants mainly submitted that the approach adopted by the Trial Court while considering both the applications was obviously inconsistent. He has criticised the conclusions reached by the Trial Court in so far as the issue of attachment before judgment and refusing relief of injunction regarding the remaining property.

8. On the other hand, Shri M.S. Usgaonkar, learned Senior Advocate supported the findings recorded by the Trial Court while rejecting the application for attachment before judgment. However, he contends that the Trial Court was wrong in granting injunction even as regards to part of the properties. He states that in fact, the Respondents have been advised to challenge this order and that the Respondents had kept the appeal ready to be filed before this Court, but to obviate the possibility of creating wrong impression that the Respondents were avoiding hearing of the present matter, the same has not been tendered in the Registry. There is no reason to doubt the correctness of the statement made by Shri Usgaonkar, learned Senior Advocate in this behalf.

9. After having considered the rival submissions, it is obvious that both the parties are not satisfied with the order passed by the Trial Court to the extent it has negative their contention.

10. Shri Lotlikar, learned Senior Advocate has reiterated the grounds which have been pressed into service before the Trial Court to contend that this was a fit case where the Trial Court ought to have allowed the application for attachment before the judgment as also injunction for the remaining property. The said grounds are elaborately set out in para 28 of the judgment under appeal.

11. On the other hand, Shri Usgaonkar, learned Senior Advocate submits that the apprehension expressed by the Appellants was totally misplaced. He submits that the transactions upon which reliance was placed by the Appellants had taken place much before the institution of the suit. It is not in dispute that the present suit has been filed on 8th February, 2000 and the transactions which were relied as relevant circumstances by the Appellants had taken place much prior to that.

12. Even taking liberal view of the matter, it would still appear that the Respondents had vide letter dated 8th January, 2000 clearly asserted their claim for a sum of Rs. 1,26,00,000/- from the Appellants. No doubt, after filing of the suit, the Respondents have issued debit note on 9th March, 2000 claiming that the figure mentioned therein (Rs. 1,88,27,796/-) was on the basis of closing the mutual and current account towards over surplus by the Respondents to the Appellants from 25th March, 1998 to 25th June, 1999. On the basis of this stand, the Respondents have filed counterclaim in the present suit filed by the Appellants claiming a sum of Rs. 1,89,27,796/- with set of Rs. 67,44,716/- and claiming relief for Rs. 1,22,83,079.44.

13. To counter this position, Shri Lotlikar, learned Senior Advocate points out that in fact, there are different transactions between the parties and the liability of the Respondents in that behalf would arise, in which case the Appellants would be entitled to claim amount from the Respondents. He supports this submission by pointing out that besides the present suit, the Appellants have filed two suits for recovery of Rs. 2,64,71,705/- towards the loaning transaction between the parties, whereas another suit being Special Civil Suit No. 21/2000/A has been filed for recovery of Rs. 2,97,58,668-49 arising out of transaction relating to exchange of ore. He also points out that there is another suit filed by the sister concern of the Appellants against the Respondents being Special Civil Suit No. 8/2000/A for recovery of a sum of Rs. 7,40,405-83. The Respondents on the other hand contend that even in that suit, the Respondents have set up counterclaim to the extent of Rs. 71,03,759-07 plus set of Rs. 5,45,190-93.

14. It is not in dispute that in each of these suits similar applications have been filed by the respective Plaintiffs. However, the Trial Court has chosen to decide only the two applications in the present suit without adverting to the pleadings in the other proceedings, which in my view are companion proceedings. Since different suits were pending between the same parties in respect of different transactions and the question of final liability vis-a-vis the parties would depend on the ultimate finding that would be recorded by the Court having regard to the respective transactions, it would have been appropriate and in the interest of all parties that all the applications were heard and decided together. The fact that the Trial Court has not been able to record an authoritative opinion about the liability of the Respondents is evident from the impugned Judgment. The Trial Court at one place observes that the defence of the Respondents raising counterclaim of Rs. 1,89,29,796/- cannot be discarded at the threshold. Whereas it also proceeds to record opinion that the legality of selling 38,500 tones of ore to M/s. Kudnai Mineral cannot be considered as ex-facie sham transaction. The Trial Court also proceeds to record that inference drawn by the Appellants that the Respondents have decided to close the business is not in accordance with the factual position on record, for the Defendants produced ample evidence that they are still in mining business and still fighting against heavy odds and further that they are not to dispose of their property or delay the execution of any decree that the Appellants might obtain. In para 40 of the impugned order, the Trial Court records that needless to emphasise that the Respondents herein also raised a counterclaim against the Appellants in a sum of Rs. 12,08,30,79-44 with a set of Rs. 67,44,716-56 on the basis of which the Appellants claim the present relief. The Trial Court was also conscious of the fact that the dealings between the parties and more particularly the transactions were of composite nature and that the Respondents had drawn debit notes in favour of the Appellants. The Trial Court obviously did not arrive at a final conclusion as to whether it was Respondents' liability to pay to the Appellants or vice versa. This could have been done only if the Trial Court had adverted to the pleadings of the other proceedings so as to ascertain the liability of the parties though prima facie. In

my view, without arriving at this basic conclusion, which would be the foundation of grant of relief for attachment or grant of injunction, the Trial Court has committed obvious mistake in deciding the subject applications.

15. I am conscious of the fact that there is no formal challenge by the Respondents to the impugned order passed against them, injuncting them to deal with certain properties, but as observed earlier, the Respondents do intend to challenge that part of the order by filing separate appeals. Besides, the Advocate for the Appellants fairly agreed to proceed with the matter in absence of such appeal and permit the Respondents to assail the operative order passes against them. Therefore, the correctness of order in its entirety is being examined even in absence of appeal presented by the Respondents.

16. After perusing the documents/pleadings relied by the respective parties, I am of the opinion that, the Trial Court - in the first place, ought to have thoroughly examined the rival claims and found out whether the Respondents were liable to pay to the Appellants as claimed by the Appellants or whether the Appellants were liable to pay to the Respondents as claimed by the Respondents. Unless this opinion was reached, neither the application for attachment before judgment nor the relief of injunction as prayed for could have been considered. Since there is basic error in the approach of the Trial Court, it is not possible to sustain the order which is under challenge in the present appeals. The appropriate course in such a situation, as submitted by both the Advocates, would be to set aside this order and remand the matter to the Trial Court to adjudicate all the pending applications together in the other three suits referred to above and the applications in the present suit, so that a complete picture emerges before the Court to record on the issue of liability of the parties. The Court may thereafter examine the merits of the contentions. It is made clear that I am not expressing any opinion on the merits of the rival contentions.

17. By now, it is well settled that even for granting injunction the Court has to record clear finding with regard to three cardinal principles, namely, prima facie case, balance of convenience and irreparable loss. The Trial Court has not recorded any finding on these three aspects separately, though it proceeded to grant injunction partly in favour of the Appellants. The parameters that would apply while considering the relief of attachment before judgment would be far more severe as the said relief can be granted only in exceptional situations. It would be, therefore, imperative for the Trial Court to examine all these aspects afresh on merits and in accordance with law.

18. Shri Lotlikar, learned Senior Advocate is justified in contending that the approach of the Trial Court of refusing to invoke the doctrine of lifting of corporate veil is erroneous and in fact contrary to the view expressed by the Apex Court and the other decisions relied upon in that behalf. The Trial Court has, however, assumed that the said doctrine can be invoked only in respect of tax matters and not in matters with regard to transactions which are subject matter of the present proceedings. This approach is obviously incorrect and

contrary to the well settled principles. Be that as it may, it is not necessary to elaborate this matter in extenso for the reason that the matter is being remanded to the Trial Court for fresh adjudication in accordance with law. The Trial Court shall not be influenced by any observations made in the impugned order and instead proceed to decide the rival pleas on merits in accordance with law.

19. For the aforesaid reasons, both the appeals succeed and are allowed, but the impugned order is quashed in toto, including the order granting injunction in part in favour of the Appellants and the matters are remanded to the Trial Court to decide it afresh in terms of the observations made hereinabove.

20. The Appellants have no objection for such order being passed in their own appeal, though adverse to them, but however, pray that the interim arrangement as directed by this Court in Civil Revision Application No. 83/2000 dated 31st March, 2000 be revived. The Respondents have no objection for reviving the directions contained in the said order but they rely on another order passed by this Court which modified the above order in Miscellaneous Civil Application No. 48/2000 in Civil Revision Application No. 83/2000, dated 18th January, 2001. Accordingly, the Respondents undertake that they would abide by the impugned order passed by this Court as modified on January 18, 2001 till the Trial Court finally decides all the applications including applications pending in companion suits between the same parties. The Trial Court is directed to decide all the Miscellaneous Applications pending between the parties expeditiously preferably within three months from the receipt of this order. The Trial Court may thereafter expedite all the four suits and decide the same together as requested by the parties appearing before this Court, preferably within one year from the passing of the order on the Miscellaneous Applications.

21. Order accordingly. No order as to costs.